ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
Streamlining Broadcast EEO	)	
Rules and Policies, Vacating the EEO	)	MM Docket No. 96-16
Forfeiture Policy Statement	)	
and Amending Section 1.80 of	)	
the Commission's Rules To Include	)	
EEO Forfeiture Guidelines	)	

To: The Commission

COMMENTS OF THE LUTHERAN CHURCH - MISSOURI SYNOD

The Lutheran Church - Missouri Synod (the "Church"), licensee of Stations KFUO(AM) and KFUO-FM, Clayton, Missouri (sometimes collectively "KFUO"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby submits its comments in response to the above-captioned Order and Notice of Proposed Rule Making (the "NPRM"), released February 16, 1996.

INTRODUCTION

1. In the NPRM, the Commission expresses the concern that its EEO Rule and policies may unnecessarily burden certain distinctly situated broadcasters and seeks comments on proposals to "clarify" and "improve" its policies in order to provide relief to such broadcasters. NPRM at ¶ 1. The Church believes that in a clarification of its EEO requirements, the Commission should state that religious licensees have the right to use religious knowledge or affiliation as a qualification for any job positions for which those licensees deem it appropriate to serve their religious missions. It would be inappropriate for the Commission to issue a

clarification of its EEO requirements without taking this step, which is necessary in order to respect religious licensees' fundamental freedoms under the First and Fifth Amendments, the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (the "RFRA")[1/], and the national policy established by Congress in section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) ("section 702").[2/] Such a clarification will be race and gender neutral, as religious organizations will continue to make affirmative efforts to recruit minorities and women from within their respective religious faiths for positions that have religious qualifications.

2. The Church is a nationally recognized religious institution with 2.6 million members. It has a longstanding commitment to nondiscrimination and has made a continuous outreach toward African American families, including the creation of a Board for Black Ministry Services that is designed to expand the Church's African American membership. The Church's membership includes 50,000 African Americans, 86 African American pastors, and 30 African American faculty and administrative members of its colleges and seminars.

3. The Church, either directly or through its Concordia Seminary (the "Seminary"), has been the owner and operator of KFUO(AM) since 1924. KFUO(AM) has the distinction of being the world's oldest religious broadcast facility -- it was the first daily station to air and continuously maintain a religious format. In 1948, the Church commenced operation of KFUO-

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1/ In enacting the RFRA, Congress found that "governments shall not substantially burden the free exercise of religion even if the burden results from a rule of general applicability," and legislated that agencies can substantially burden the free exercise of religion only if they can demonstrate a "compelling governmental interest" and can show that the burden is the least restrictive means of furthering that compelling governmental interest."

2/ Section 702 provides: "The subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

FM, which is the only classical format station in the St. Louis market. The FM features classical music with a religious orientation. The studios of both KFUO stations are located on the campus of the Seminary in Clayton, Missouri.

4. KFUO(AM)'s first license was issued to the Seminary by then Secretary of Commerce Herbert Hoover on January 29, 1925. The Seminary, the Church and KFUO had a spotless record over the next 70 years -- neither the FCC nor its predecessor agency cited the stations for any violations of rules or policies. In 1994, however, the Commission designated for hearing the Church's license renewal applications for KFUO, which had been filed on September 29, 1989. Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 9 FCC Rcd 914 (1994) (the "HDO"). Among the issues raised by the HDO was whether the Church had violated the Commission's EEO Rule by using religious qualifications for certain job positions at KFUO where the relevant job functions might not, in the FCC's determination, be "reasonably connected" to the espousal of the Church's religious views.

5. The issue as to whether the Government can legally second-guess a religious organization's judgments about how best to hire staff in order to serve its mission is now unfortunately being litigated in the adjudicative context. The National Religious Broadcasters ("NRB") has also raised the issue of the Commission's proper role in such determinations in this rulemaking, where the views of various interested parties can be considered. Comments of National Religious Broadcasters in MM Docket No. 96-16, FCC 96-49 (filed April 30, 1996). Thus, the Church has a direct interest in the resolution of this proceeding.

DISCUSSION

I. ANY CLARIFICATION OF THE EEO RULE SHOULD INCLUDE A FULL EXEMPTION FOR RELIGIOUS LICENSEES FROM THE PROHIBITION ON RELIGIOUS DISCRIMINATION

6. Under a policy based on twenty year old caselaw that the Commission still treats as controlling, religious licensees are permitted to have religious job qualifications only for positions that the Government determines are "reasonably connected" to the espousal of the licensees' views.[3/] In any clarification of its EEO requirements, the Commission should modify this policy and state that religious licensees have the right to use religious knowledge or affiliation as a qualification for any job position for which those licensees deem it appropriate to serve their religious missions. As mentioned, the NRB has filed comments in this proceeding in which it also urges the Commission to modify its EEO regulations to permit religious organizations to establish religious belief or affiliation as an occupational qualification for all station employees. The NRB shows that this is necessary to accommodate the legitimate needs of religious broadcasters and to avoid the serious legal problems of a more restrictive policy.

7. The NRB's comments describe at pages 8-11 some of the serious practical problems caused by any policy that allows the Government to usurp the right of religious organizations to determine which positions are sufficiently religious to warrant religious job

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3/ See HDO, 9 FCC Rcd at ¶ 26 (1994), citing King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C.Cir.), cert. denied, 419 U.S. 996 (1974). In a 1972 administrative decision, the Commission had allowed religious job qualifications only for persons hired to "espouse a particular religious philosophy over the air." King's Garden, Inc., 38 F.C.C. 2d 339 (1972). In affirming the result of that decision, however, a panel of the Court of Appeals for the District of Columbia Circuit used a broader formulation, allowing religious qualifications for those employees having a "substantial connection with program content." King's Garden, Inc. v. FCC, 498 F.2d at 61. In the HDO, the Commission spoke of positions that were reasonably connected to the espousal of religious licensees' views, which appears to be a different standard from either the one in its 1972 decision or the standard stated by the Court of Appeals panel. See HDO, 9 FCC Rcd at ¶ 26 (1994).

criteria. For example, the existing partial exemption may lead to situations where certain employees cannot be promoted at stations because their religious views may not be consonant with the performance of higher level management jobs. Religious organizations must confront this consequence -- certainly not intended by the Commission -- of two-career paths at their stations. Moreover, the NRB explains that the current policy may effectively deprive religious organizations of the ability to maintain a unified sense of organizational mission, thereby depriving those organizations of a key management tool that is available to all other broadcasters. In short, the current policy involves the FCC in the *micromanagement* of stations operated by religious organizations. This is because under the current policy, the only means for the religious organizations to achieve certainty about whether they can use religious preferences for particular job functions is to file for declaratory rulings about each job function at their stations about which there is any doubt, and for the Commission to rule on each of the fact-specific petitions for declaratory rulings.

8. More importantly, the Commission's current partial exemption subjects religious licensees to untenable ongoing governmental entanglement in their religious affairs, and to chilling effects on their processes of self-definition, in violation of those licensees' rights under the RFRA, the Supreme Court's holding in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) ("Amos"), and section 702. It should be noted that the Commission has not addressed the issue concerning the rights of religious licensees and the resulting need for a religious exemption to its EEO rules for over 20 years, in spite of repeated requests for clarification. See National Religious Broadcasters, Inc., 43 F.C.C. 2d 451 (1973) (letter seeking clarification); King's Garden, Inc., 38 F.C.C. 2d 339 (1972) (petition for rule making). Thus, the Commission has never considered the effect of

either the Amos decision or the RFRA on its EEO rules. The Commission's position must now be reconsidered and changed in light of the changes in the law that have occurred since the King's Garden decision in 1974.

9. In Amos, a building engineer who worked for a gymnasium operated by an entity associated with a church was discharged because he failed to qualify for a certificate that he was a member of the church and eligible to attend its temples. The engineer sued under Title VII of the Civil Rights Act. Amos, 483 U.S. at 330-31. The gymnasium moved to dismiss on the ground that it was shielded from liability by section 702 of that act, exempting religious organizations from claims of religious discrimination.

10. The Supreme Court rejected plaintiff's argument that section 702 violated the Establishment Clause of the First Amendment if construed to allow religious employers to discriminate on religious grounds in hiring for the janitorial position at issue. The Court held that section 702 had the secular purpose of alleviating "significant governmental interference with the ability of religious organizations to define and carry out their religious missions" (Amos, 483 U.S. at 335), and stated that Congress "acted with a legitimate purpose in expanding the section 702 exemption to cover *all* activities of religious employers." Id, at 339 (emphasis added). In so holding, the Court observed that

> it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. at 336 (footnote omitted).

11. In upholding the constitutionality of section 702, the Court reversed the district court's opinion that the provision was unconstitutional as applied to supposedly "secular" jobs, and rejected the district court's attempt to arrogate to itself the role of determining whether particular jobs were "properly" considered religious by a church. Amos, 483 U.S. at 333 n. 13. The concurring opinion of Justice Brennan described how the *process* of second-guessing a church's determination as to the desirability of religious knowledge for certain job functions raises grave threats to First Amendment rights to the free exercise of religion:

> What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.

Id. at 343-44 (Brennan, J., concurring) (citation omitted).[4/]

[4/] The record in the Commission's case against the Church shows that Justice Brennan's fears were prophetic. Prior to hearing, the staff asked the Church to explain what aspects of particular positions required theological training. In the HDO, the Commission raised questions about the relationship between the Seminary and KFUO, and specifically about whether it was legal for KFUO to hire Seminary students without engaging in formal outreach efforts to secular employment agencies. HDO, 9 FCC Rcd at ¶¶ 21, 26. And at the hearing both FCC trial counsel and the ALJ engaged in constitutionally unsavory questioning of a Church witness about whether it was helpful for certain full and part-time station personnel to have knowledge of the Lutheran calendar, an inquiry that necessarily delved into theological matters. Invasive questioning had concrete effects on the Church's free exercise activities, causing the Church to discontinue a decades old on-air internship program for its Seminary students for fear of continued unlawful intrusion into the issue of whether it was appropriate to have a training program with a religious

(continued...)

12. The Court's reasoning in Amos, and Justice Brennan's concurrence in particular, leaves no doubt that any case-by-case analysis by the Commission of job functions at religious stations, and any Governmental determination as to which positions at those stations are sufficiently religious to warrant religious job criteria, violates the Free Exercise Clause of the First Amendment and the RFRA. Under the applicable test, formally enacted by Congress in the RFRA, a statute may stand only if the law in general, and the Government's refusal to allow a race neutral religious exemption in particular, are justified by a compelling interest that cannot be served by less compelling means. Sherbert v. Verner, 374 U.S. 398, 403 (1963). There is no compelling Governmental interest which could justify the FCC's usurpation of religious licensees' right to define themselves by determining the particular job functions at stations that require religious knowledge. The Court's decision in Amos establishes that the only viable candidate for such a compelling interest -- the need to avoid supposed Establishment Clause problems -- is insufficient. The underpinning of the EEO Rule, the Commission's desire to promote programming diversity (NPRM ¶ 3) certainly provides no authority for second-guessing a religious organization's judgments about which job functions need religious criteria in order to best serve its religious mission. There is no reason to believe that diversity of programming will somehow be diminished if the FCC maintains its prohibitions on race and gender discrimination, allows affirmative action efforts with respect to minorities and women within the context of the religious organization's faith, but ceases to usurp the role of determining which jobs at religious organizations can be subject to religious job criteria. Similarly, under the Fifth Amendment the Commission would need a compelling justification for affirmative action requirements,

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4/ (...continued)
educational institution.

especially when they interfere with free exercise judgments. Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995). But no such compelling justification exists.

13. To be sure, in the twenty year old decision in King's Garden, a panel of the District of Columbia Circuit rejected a challenge under the Free Exercise Clause of the First Amendment to the FCC's policy allowing religious criteria only for a limited range of positions established by the Government. However, the court of appeals panel's decision was based on its view that the Government would not infringe a licensee's First Amendment rights by drawing lines between secular and religious job functions because "[w]here a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension, enforcement of the Commission's anti-bias rules will not compromise the licensee's freedom of religious expression." King's Garden, 498 F.2d at 61. The court of appeals panel therefore completely failed to acknowledge the grave dangers, described by the Court and particularly by Justice Brennan in Amos, which result from the *process* of governmental line-drawing itself. See ¶ 11, supra. For this reason, the decision by the panel in King's Garden does not survive the Court's decision in Amos thirteen years later, and is simply no longer good law.

14. It is important to note that an exemption that permits religious licensees such as the Church to use religious affiliation or knowledge as a hiring criterion at their stations would be race and sex neutral. The exemption will therefore not interfere with the Commission's two objectives in its EEO rule: to promote programming that reflects the interests of minorities and women in the local community and to deter discriminatory practices. NPRM ¶ 3. Indeed, the exemption will *increase* diversity by permitting religious licensees to add their distinctive voices to the airwaves, free of unconstitutional Governmental entanglement and of chilling effects on

their vital processes of religious self-definition.[5/] Thus, the exemption is clearly in the public interest and should be adopted in this proceeding.

CONCLUSION

For all the above reasons, and for the reasons given by the NRB in its comments in this proceeding, the Commission should state in a clarification of its EEO Rule that religious organizations have the right to use religious knowledge or affiliation as a qualification for any job positions for which those licensees deem it appropriate to serve their religious missions.

Respectfully submitted,

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5/ In Intercontinental Radio, Inc., 56 RR 2d 903, 925 (Rev. Bd. 1984), the Review Board commented in reviewing the licensee's renewal expectancy, that "[i]t will suffice to credit such programming as properly designated 'religion' to observe that the concept of diversity of 'ideas' in broadcasting goes to 'esthetic, moral and other ideas and experiences' as well as 'political' and 'social' ideas," citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

CERTIFICATE OF SERVICE

I, Marionetta Holmes, hereby certify that copies of the foregoing **"COMMENTS OF THE LUTHERAN CHURCH-MISSOURI SYNOD"** were served via hand-delivery on this 11th day of July, 1996, to the following:

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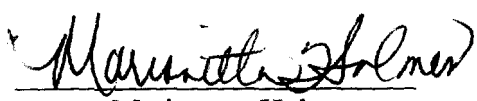

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